

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

01-CR-131
(LEK)

STEVEN ROBINSON, a/k/a WISE,

Defendant.

MEMORANDUM-DECISION AND ORDER

I. Background

In this criminal case, the Government alleged that Defendant Steven Robinson (“Robinson”) and six co-defendants, including his brothers Mark and Charles, engaged in a marijuana distribution operation in Albany, New York in the 1990s. All of Robinson’s co-defendants pleaded guilty, but Robinson was tried before a jury in October and November 2002. Robinson was charged with (i) conspiracy to distribute and possess with the intent to distribute more than one hundred kilograms of marijuana, in violation of 21 U.S.C. § 846; (i) two counts of using a firearm in furtherance of the marijuana conspiracy, in violation of 18 U.S.C. § 924 (c); and (iii) causing the death of another in the course of using a firearm, in violation of 18 U.S.C. § 924 (j). On November 18, 2002, following a 15-day trial, the jury found Robinson guilty of all four counts. Presently before the Court is Robinson’s motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29(c) or, in the alternative, for a new trial pursuant to Fed. R. Crim. P. 33. Robinson argues that the evidence

presented at trial was insufficient to convict him of any of the counts.

II Discussion

A. Legal Standards

1. Rule 29 Motion

Rule 29 of the Federal Rules of Criminal Procedure provides that “the court on the defendant’s motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.” Fed. R. Crim. P. 29(a). “[A] district court can enter a judgment of acquittal on the grounds of insufficient evidence only if, after viewing the evidence in the light most favorable to the prosecution and drawing all reasonable inferences in the government’s favor, it concludes no rational trier of fact could have found the defendant guilty beyond a reasonable doubt.” United States v. Reyes, 302 F.3d 48, 52 (2d Cir. 2002) (citations omitted). When considering a motion for a judgment of acquittal, “the court must be careful to avoid usurping the role of the jury.” United States v. Guadagna, 183 F.3d 122, 129 (2d Cir. 1999). Accordingly, this Court must “‘give[] full play to the right of the jury to determine credibility’” and may not “‘substitute its own determination of . . . the weight of the evidence and the reasonable inferences to be drawn for that of the jury.’” Id. (quoting United States v. Mariani, 725 F.2d 862, 865 (2d Cir. 1984)).

The Court must be particularly careful to defer to the jury in conspiracy cases because “a conspiracy by its very nature is a secretive operation, and it is a rare case 'where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel.'" U.S. v. Pitre, 960 F.2d 1112, 1121 (2d Cir. 1992) (quoting United States v. Provenzano, 615 F.2d 37, 45 (2d Cir. 1980)). In reaching its verdict, the jury may rely “entirely on circumstantial evidence.” United

States v. Martinez, 54 F.3d 1040, 1043 (2d Cir. 1995) (citations omitted). In addition, “[w]hen making a case based on circumstantial evidence, the government need not ‘exclude every reasonable hypothesis other than that of guilt.’” Guadagna, 183 F.3d at 130 (quoting Holland v. United States, 348 U.S. 121, 139 (1954)). A motion for a judgment of acquittal should thus be granted “only if the evidence that the defendant committed the crime alleged is ‘nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt.’” Id. (quoting United States v. White, 673 F.2d 299, 301 (10th Cir. 1982)).

2. Rule 33 Motion

Rule 33 of the Federal Rules of Criminal Procedure states that “the court may vacate any judgment and grant a new trial if the interest of justice so requires.” Fed. R. Crim. P. 33. The Second Circuit recently explained the standard that governs a court’s review of a Rule 33 motion:

The ultimate test on a Rule 33 motion is whether letting a verdict stand would be a manifest injustice. The trial court must be satisfied that competent, satisfactory and sufficient evidence in the record supports the jury verdict. The district court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation. There must be a real concern that an innocent person may have been convicted. Generally, the trial court has broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29, but it nonetheless must exercise the Rule 33 authority sparingly and in the most extraordinary circumstances.

United States v. Ferguson, 246 F.3d 129, 134 (2d Cir. 2001) (internal quotation marks and citations omitted).

When considering a Rule 33 motion, “the court may weigh the evidence and credibility of witnesses.” United States v. Autuori, 212 F.3d 105, 120 (2d Cir. 2000) (citation omitted).

However, as with a Rule 29 motion, the Court must take care not to usurp the role of the jury.

Ferguson, 246 F.3d at 133. “Because the courts generally must defer to the jury’s resolution of

conflicting evidence and assessment of witness credibility, ‘[i]t is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment.’” *Id.* at 133-34 (quoting United States v. Sanchez, 969 F.2d 1409, 1414 (2d Cir. 1992)).

B. Sufficiency of the Evidence

1. Conspiracy to distribute and possess with the intent to distribute more than one hundred kilograms of marijuana

At trial, witnesses likened Albany’s North Swan Street in the 1990s to an open-air drug market. Witnesses testified that they purchased marijuana from Robinson and his co-conspirators from buildings on North Swan Street and an apartment on Alexander Street. The defense argued that while Robinson sold marijuana on North Swan, he was not engaged in a conspiracy with the named co-conspirators. However, several witnesses offered testimony linking Robinson to his co-conspirators. James Fredricks testified that he sought marijuana at a location where Mark Robinson grew, prepared for sale, and sold marijuana. He testified that Robinson was at this location and that he told Fredricks to come back later because Robinson wasn’t selling at that time. Phillip Head and David Johnson testified that Robinson sold marijuana that had been prepared for sale by Mark Robinson. Joseph Durham testified that he sold marijuana for Robinson and would give the proceeds from the sales to Robinson or his co-conspirators.

James Farmer testified that from 1993 to 1998 he sold four to six ounces of marijuana per day from the Alexander Street apartment for Charles Robinson. David Johnson testified that, on average, he sold between a quarter-pound to a pound of marijuana per day for Mark Robinson. Phillip Head testified that Mark Robinson stated that he sold around two pounds of marijuana per

day.

Some of the testimony given by the Government's witnesses was patently incredible. For example, Thomas St. Martin testified that he saw Robinson in 1995, 1996, and 1997 at one of the apartments that was used to house and package marijuana for sale. This testimony cannot be believed because Robinson was incarcerated from July 1994 to June 1997. There was also evidence that Robinson's relationship with his co-conspirators was at times contentious. For example, David Johnson testified that Robinson robbed him at gunpoint and took the marijuana that Johnson was selling for Charles Robinson and the proceeds from Johnson's earlier sales.

Notwithstanding such deficiencies in the testimony of the Government's witnesses, there was sufficient evidence to sustain a guilty verdict on this count. The jury could have credited the testimony of Fredricks, Head, Johnson, and Durham regarding Robinson's role in the conspiracy. This testimony supported the jury's verdict that Robinson conspired to distribute marijuana. The jury could also have credited the testimony of Farmer, Johnson, and Head as to the amount of marijuana involved in the conspiracy. This testimony supports the jury's verdict that Robinson conspired to distribute more than 100 kilograms of marijuana.

2. Use of a firearm in furtherance of the marijuana conspiracy (July 29, 2000)

The jury found Robinson guilty of using a firearm on July 29, 2000, in furtherance of the conspiracy. The Government presented evidence that on July 29 Robinson fired a gun at Anthony Britton, a drug dealer and one of Robinson's competitors. Witnesses testified that they saw guns at the locations from which Robinson and his co-conspirators dealt marijuana. For example, Joseph Durham testified that he saw various guns in a basement from which large quantities of marijuana were sold. Durham also stated that he observed his father sell two firearms to Robinson.

With respect to the specific offense charged, Anthony Britton testified that Robinson shot at him. Britton stated that while the shooter wore a mask, he was sure that Robinson was the shooter. The jury could have discounted Britton's testimony. Convicted for conspiracy to commit murder, Britton was hoping to receive certain benefits from the government in exchange for his testimony. However, the jury apparently decided that Britton's testimony was truthful and the Court may not upset this determination.

3. Use of a firearm in furtherance of the marijuana conspiracy and causing the death of another in the course of using the firearm (October 11, 2000)

Several witnesses testified about the events surrounding the October 11, 2000 shooting that resulted in the wounding of Auckland Dubery and David Hood and the death of Jerome Johnson. The Government contended that Robinson intended to shoot Dubery, a competing drug dealer, but accidentally shot Johnson instead. Roman Caldwell and Kelvin Willingham testified that the shots which killed Johnson came from a white car. Willingham testified that he saw an arm holding a gun sticking out of the car's window. Caldwell stated that he saw shots fired from the car's window.

Auckland Dubery was the only witness who identified Robinson as the driver of the white car.¹ Dubery admitted to smoking three marijuana cigars in the six hours prior to the shooting. It is therefore highly likely that Dubery was under the influence of marijuana at the time that Johnson was killed. Immediately after the shooting, Dubery told police that he did not know who the shooter was. A few days later, while Dubery was recovering in the hospital, Dubery told a detective that he

¹Kim Smith, a prosecution witness, testified that Robinson was a passenger in the white car. According to Smith, Robinson got out of the car after the shots were fired. The jury properly rejected Smith's testimony. Smith's testimony regarding the October 11 shooting was confused and differed markedly from the account she gave a detective on the night of the shooting. Smith also testified that she lies to the police to get out of trouble. In its closing argument, the Government suggested that the jury should disbelieve Smith's testimony.

did not know who the shooter was. He changed his story and identified Robinson as the shooter only after his girlfriend, Rachel, discussed the potential benefits that Dubery could receive in exchange for his identification of the shooter.

At trial, Dubery testified that he saw the white car pull up while he was selling marijuana on North Swan Street with Jerome Johnson. He stated that Robinson was the only person in the car. He further testified that he saw Robinson put a bandana over his face. Dubery did not detail what happened after Robinson put on the bandana. Instead, he vaguely testified that shots rang out soon thereafter. Dubery never stated that he saw Robinson fire a gun.

Dubery has given two accounts of what happened on October 11. One account is a lie. The version that identifies Robinson as the shooter was offered only after Dubery had a motive to provide false information. At the time of the shooting, Dubery was awaiting sentencing on state charges stemming from his possession of five pounds of marijuana. Rachel hoped that in return for Dubery's agreement to testify against Robinson, the police would drop the criminal charges that were pending against Dubery. While the police refused to drop the charges, they offered to enroll Dubery, Rachel, and Rachel's child in the witness protection program pending Robinson's trial. While in the witness protection program, Dubery, Rachel, and Rachel's child received medical benefits and money. Tens of thousands of dollars were spent by the government on behalf of Dubery because he identified Robinson as the shooter.

Dubery's dubious testimony is exceedingly weak support for the jury's finding of guilt. While a judgment of acquittal is not warranted under the circumstances, the Court grants Robinson's motion for a new trial on the charges related to the October 11 shooting. See Autuori, 212 F.3d at 120-21 (affirming district court's grant of new trial where "the credibility of the

[government's] principal witnesses was weak and the soundness of the verdict is highly doubtful").

The Court is well aware that prosecutors are often forced to rely on unsavory witnesses to prove their cases. In drug conspiracy cases, the key witnesses are often drug addicts or convicted criminals. Many such witnesses expect the Government to provide some benefit in return for their cooperation. The Court countenances this state of affairs so long as the testimony does not lead to a wrongful conviction. The realities of prosecuting drug cases can never erode the requirement that the prosecution prove its case "beyond a reasonable doubt." This crucial standard is the same for all accused, irrespective of the crime charged. As the Supreme Court has explained, "use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." In re Winship, 397 U.S. 358, 365 (1970).

While the jury's determinations are properly accorded great respect, in rare occasions the Court must exercise its discretion and set aside a verdict when the prosecution has clearly failed to meet its burden of proving guilt beyond a reasonable doubt. The Court recognizes that the grant of a new trial is extraordinary. Having presided over several hundred trials in a thirty year period, this Court has upset jury verdicts only in a few exceptional cases, where judicial intervention was necessary to prevent a manifest injustice. This is one of those cases: the evidence that Robinson killed Jerome Johnson was far too flimsy to support a conviction. Our criminal justice system is rooted in the principle that a defendant, presumed innocent, shall not lose his liberty unless his guilt is proved beyond a reasonable doubt. Guided by this polestar, the Court is compelled to grant Robinson's motion for a new trial on the charges relating to the October 11 shooting.

III Conclusion

Accordingly, it is hereby:

ORDERED that Defendant Steven Robinson's motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29(c) is **DENIED**; and it is further

ORDERED, that Defendant Steven Robinson's motion for a new trial pursuant to Fed. R. Crim. P. 33 is **GRANTED** as to count 4 (use of a firearm in furtherance of the marijuana conspiracy on October 11, 2000) and count 5 (causing the death of another in the course of using the firearm on October 11, 2000) of the indictment and **DENIED** as to the remaining counts; and it is further

ORDERED that the Clerk of the Court shall serve copies of this order by regular mail upon the parties to this action.

IT IS SO ORDERED.

DATED: May ___, 2003
Albany, New York

HONORABLE LAWRENCE E. KAHN
UNITED STATES DISTRICT JUDGE